PROOF OF INJURY AND DISABILITY

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RULES OF EVIDENCE

The primary legal requirements of "injury" and "disability" are discussed elsewhere in this symposium. We discuss the rules governing the manner of proof of "injury" and "disability" before the Administrator, the boards of review and the Industrial Commission together with some of the methods and procedures which are available to the compensation practitioner in presenting such proof.

The burden of proof is unquestionably upon the claimant to establish both the occurrence of an "injury" and the existence of the claimed "disability" and such proof theoretically must be by a preponderance of the evidence the same as in most civil litigation.[1] This, of course, simply means any proof of probative value which would warrant a finding on the primary issues in favor of the claimant which is of "greater weight" than the evidence which would tend toward the disallowance of the claim. This burden is imposed upon the claimant as to all essential elements which must be established in order for his claim to be allowed, *e.g.*, that he sustained an injury as defined in Ohio Revised Code section 4123.01(C); that he is an "employee" entitled to the benefits provided by law as defined in Revised Code section 4123.01(A); that he is disabled to the extent to which disability may be claimed; that death was directly and proximately caused and appreciably hastened by the injury;[2] in a death claim, that he is one of the dependents entitled to benefits, etc.

This statement of the burden of proof upon the claimant, however, does not answer any questions really. Its application in practice, as affecting the "real" burden on the claimant, is the factor of importance. We shall discuss the rules of evidence as applied in workmen's compensation matters at the administrative level and the various forms of evidence which may be used in respect to the proof of injury and disability. Rules of evidence and forms of proof in a trial de novo in the Common Pleas Court[3] are not discussed here, but such are not significantly different than involved in other types of civil litigation.

The term "evidence" is quite broad, encompassing all forms of proof in support of or in opposition to any compensation claim. The usual rules of evidence, both common law and statutory, are not binding

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[1] Johnson v. Industrial Comm'n, 164 Ohio St. 297, 130 N.E.2d 807 (1955); 42 OHIO JUR. *Workmen's Compensation* § 135 (1936).

[2] McKee v. Electric Auto-Lite Co., 168 Ohio St. 77, 151 N.E.2d 540 (1958); McNees v. Cincinnati St. Ry., 152 Ohio St. 269, 89 N.E.2d 138 (1949).

[3] OHIO REV. CODE § 4123.519 (Baldwin 1958).

in any of the proceedings before the Administrator, boards of review or the Industrial Commission.[4] It is to be noted that this statute does not say that such rules of evidence should not be applied, but only that they are not binding. If the usual rules of evidence are not binding, it may be inquired as to what rules, if any, are binding and control the proceedings and handling of claims. This is a difficult question. The best brief answer is to say the discretion of the hearing officers, the boards of review and Industrial Commission. It is fair to say, however, that while the ordinary rules of evidence are not regarded as binding, many of them in fact are applied daily by the administrative officers.

There are, of course, certain written and unwritten rules which apply. The written rules are not widely known and are not mandatory. They provide little guide as to the scheme of things. For example, "the Deputy Administrator is authorized to receive evidence in the form of affidavits, telephone or telegraphic statements, and such other documentary evidence that may be necessary."[5] Of course, a claim is presented on forms prescribed by the Industrial Commission and signed by the claimant except in the case of C-3 and OD-3 applications filed by state fund employers for the payment of medical expenses only and a few other sundry applications. Frequently allowances are based solely upon such applications and supporting medical proof where the employer does not controvert the claim. Rule 12 of the new rules proposed for adoption by the Industrial Commission, relating to self-insuring employers, and Rule 20 of the proposed new rules relating to state fund employers provide that proof of all claims shall be made by affidavit as far as possible, but the claim may be referred for investigation or for the taking of oral testimony.

Thus, it is generally true that almost *any* form of evidence may be received in a compensation proceeding at the administrative level. The absence of any controlling rules, regulations or statutes gives a wide latitude to the Administrator, the boards of review and the Industrial Commission in this respect. A claim may have four hearings before it is out of the administrative machinery and eligible for appeal to court if an application for reconsideration is filed and if the Industrial Commission elects to hear the claim on appeal from the regional board of review. At the original hearing before the Administrator a deputy hears the claim. This is usually handled by one of the hearing officers, all of whom are attorneys. There are sixteen deputies throughout the state and about twenty hearing officers or referees who handle the original hearings and claims for the Administrator at the sixteen district offices. All applications for reconsideration are heard in Columbus by Mr. George Thompson, Chief Deputy Claims Administrator. There

[4] OHIO REV. CODE § 4123.10 (Baldwin 1958).

[5] Bureau of Workmen's Compensation, IMPORTANT RESOLUTIONS, RULES, ORDERS AND INSTRUCTIONS, No. 33, at 23 (April 1, 1956).

are five regional boards of review in the state, each with three members. At least one member of each board, the chairman, is required to be an attorney.[6] About half of the present fifteen board members are attorneys. The Industrial Commission, of course, has three members, all of whom, for the first time in the Commission's history, are attorneys. There are, therefore, about forty persons in the state who are conducting hearings in compensation claims at the administrative level, over three-quarters of whom are attorneys.

In the absence of any restrictions or regulations as to the kind of evidence which may be received and considered it would seem that individual judgment and discretion is the only control under the circumstances. Considering the high caliber of these persons, in most cases this form of control is quite sufficient. That the unimportance of having spelled-out rules of evidence is generally accepted without question by the legal profession is evidenced by the fact that appeals at the administrative level are rarely, if ever, based upon the acceptance and consideration of improper proof, although frequently the weight or interpretation of the evidence is disputed. It is quite a different thing to have attorneys with specialized skill and knowledge in this field receive, consider and evaluate the evidence than to have it done by unskilled laymen in a jury box.

This detachment from rules of evidence, of course, has its advantages and disadvantages. The absence of rules, in what is not designed or supposed to be a judicial type proceeding, unquestionably speeds and facilitates the proceedings, which are usually quite informal, and the processing of claims. Also, the evidence which is presented is very rarely such as would be inadmissible in court, hearsay evidence being the outstanding exception, although frequently the manner or form in which it is presented may be objectionable. But the greatest force in support of the system is the alertness of the hearing officers and board and commission members to give consideration only to reliable evidence and to weigh such evidence fairly and judiciously; in effect, to often follow and heed the well known rules of evidence, consciously or unconsciously. For example, a hearing officer will probably not interrupt an attorney who leads the witness through his testimony in a contested claim, but this manner of presentation will surely influence his evaluation of that witness's testimony. While it might be said that the ultimate objective of the administrators is to find the truth in a given claim, if they cannot find it they should at least search for it, and they do. A further considerable "unconscious" force which is present to alleviate any undesirable effects of operating without controlling rules of evidence is the practice of attorneys in ordinarily offering only evidence which is relevant and of probative value from competent witnesses. In most cases the attorneys themselves, accus-

[6] OHIO REV. CODE § 4123.14 (Baldwin 1958).

tomed to striding within the paths of Wigmore, do not attempt to present really improper or objectionable evidence.

What disadvantages then, if any, accrue from this system? Undoubtedly, it is the inability to cross-examine where proof is presented in the form of affidavits, letters, written reports, etc. As Wigmore said in reference to cross examination, "it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

Cross-examination of the claimant without restriction may obtain at any one of the hearings, particularly the original hearing. If it is felt that the claimant may not appear at the hearing, and he ordinarily is not required to do so, a request made in advance to notify the claimant to appear at the hearing will usually be granted and the claim will not be allowed if he does not appear.

Aside from the medical issues, the primary facts relating to the compensability of a claim are ordinarily not complicated and the application of the law to the facts is usually not difficult. If they were complicated or difficult it would not be possible to process with speed the large number of claims that are handled each day. This is simply to say that ordinarily the stage or setting for evidence questions or problems does not exist at the administrative level. The medical issues are more frequently difficult of solution than the questions relating to allowance, etc. This is the "money" side of the coin. Compensation is paid for disability, not simply for an injury sustained in the course of and arising out of the employment. This area is of special concern for the further reason that, at least as to questions relating to the extent of disability, there is no right of appeal to the common pleas court. Of course, there are many rules of substantive law in reference to the medical matters.[7]

So far as proof relating to medical questions is concerned, the Administrator, the boards of review and the Industrial Commission usually rely upon written medical reports. Doctors rarely appear at the hearings (although they may, of course), and they are, therefore, usually not subjected to interrogation. It may be said that often it doesn't do much good to question the doctor anyway, that is where his report is fully explanatory and sufficient for all purposes and cannot be seriously questioned. In some cases this is assuredly true. However, in others the doctor may be proceeding on inaccurate or incorrect fact assumptions in arriving at his conclusions and opinions respecting the nature and extent of the disability or the causal connection between the death or disability and the injury.

There are other factors, however, that operate to test the medical opinion. Ordinarily there is more than one doctor who has either examined the claimant or reviewed the situation. In serious or complex

[7] See *e.g.*, Fox v. Industrial Comm'n, 162 Ohio St. 569, 125 N.E.2d 1 (1955); Aiken v. Industrial Comm'n, 143 Ohio St. 113, 53 N.E.2d 1018 (1944); Drakulich v. Industrial Comm'n, 137 Ohio St. 82, 27 N.E.2d 932 (1940).

cases in which there is a wide unexplained divergence in the submitted medical opinions, the opinion of a consultant or a specialist in the particular field may be sought. In a claim of any consequence the claimant will be examined by a doctor of the medical department of the Industrial Commission who is employed and paid by the state. The opinion of these doctors serves, in the above situations, to adjust the medical differences and provide a form of arbitration. It is the writers' belief that it is desirable that this adjustment be made by doctors rather than laymen. In most such situations the recommendation of the doctor of the medical department is followed.

Forms of Proof

What forms of evidence may be received and considered in compensation proceedings? Theoretically speaking any form of communication is receivable. In practice certain types of proof are commonly approved and used. Each party may present witnesses in person. Their testimony is usually not given under oath, although the deputies, hearing officers, board of review members and members of the Industrial Commission are empowered by statute to administer oaths.[8] Witnesses so presented are voluntary witnesses. While the statute grants the power to subpoena witnesses and also makes provision for the payment of witness fees as in civil actions, the administrative officers will almost always refuse to issue subpoenas to require the attendance of witnesses at hearings or for depositions. The reasons are several. First and foremost is the lack of funds to pay the costs of service and the mileage and fees of the witnesses. Also, it is considered that the spirit of the workmen's compensation law is that the judicial type of proceeding was not intended and is to be avoided whenever possible and that such things as the subpoena of witnesses tend to get over into the "judicial" area. Further, there are usually other satisfactory ways of obtaining the desired proof. It, therefore, seems to be the accepted administrative policy not to encumber the proceedings or the handling of claims with the compelled attendance of witnesses.

Affidavits are accepted regularly. Such statements are usually given willingly by persons who have knowledge relevant to the issues. In instances where persons who are believed to have material and relevant knowledge refuse to attend the hearing or to give an affidavit or statement, a request to send out a field investigator to obtain an affidavit or signed statement from the person may be the best solution. The affidavit is the most generally used form of proof in compensation claims. It may be submitted at any time in connection with the consideration of the claim. Such affidavits have no prescribed form.

Medical evidence is invariably presented by way of written signed reports from the doctors. Prior to the major amendments to the workmen's compensation law in 1955, after the initial hearing an application

[8] Ohio Rev. Code § 4123.08 (Baldwin 1958).

for rehearing could be filed by the claimant if he lost.[9] A record was made of the rehearing, transcribed, and used in the common pleas court in the event of an appeal. At such rehearings "the evidence for and against the allowance of the claim was submitted as in the trial of civil actions." Medical witnesses were presented live, examined and cross-examined as in an ordinary civil case. This system produced tremendous congestion in the processing of claims and was quite burdensome and expensive in operation. The new law abandoned the rehearing procedure. The expense, inconvenience, impracticality, and time which was involved in the personal appearances of medical experts in thousands of claims was unworkable and unnecessary.

The present method of acquiring medical proof by written medical reports, although not subject to cross-examination, is proving superior to the rehearing procedure. It considerably simplifies the problem of presenting medical proof. It is the opinion of the writers that the medical report method is far more satisfactory for use in the administrative scheme of processing compensation claims. Of course, now the employer may appeal certain adverse rulings whereas prior to 1955 he could not. The safeguards and protections that are incident to the right of cross-examination and testimony given under oath are satisfied in other ways. In effect, each medical report speaks for itself. A good report will be accorded more weight than a bad report. A doctor who expresses himself carefully and succinctly with a statement of his reasons is entitled to more consideration than the doctor who states his findings and conclusions vaguely and with no adequate or understandable reasons. All of life is a problem of communication, but ordinarily where a doctor is not understood it is the doctor's fault. It is to be noted that the hearing officers and others are not always astute to make this evaluation. Some seem to take the position that all medical reports stand on equal footing, that all they are concerned with is *what* the doctor's opinion is. Such reports should, of course, be examined and evaluated in much the same manner as live testimony. What kind of a history did the doctor obtain from the patient? What was his opportunity to observe him? Do his conclusions seem logical and consistent with the hearing officer's knowledge of the medical subject and his information in the particular claim? Are the conclusions and opinions convincing? Are there gaps, *i.e.*, is the examiner of the report left with any material questions concerning the matters which are the subject of the report?

Medical questions should never be determined at any stage of the proceedings on the basis of guess or speculation. The hearing officer will often refer the claim for further medical opinion or clarification of the existing medical opinion where there is some ambiguity, doubt

[9] OHIO REV. CODE § 4123.51 (Baldwin 1953). This section was repealed, eff. October 5, 1955.

or uncertainty. Others on occasion do not give such careful consideration to medical reports and merely rubber stamp the reports. It is the obligation of counsel to review carefully the medical reports when possible and to point out to the hearing officers any questions or problems respecting such reports. This is vitally important.

A further safeguard in this matter is the reputation of the particular doctor. Through the years most doctors who submit reports and make appearances in connection with compensation claims are well known and during that time they acquire a legal reputation, *e.g.*, inclination to favor one side or the other or complete impartiality, conservative or liberal in evaluation of disability. Consequently, the medical experts' reputations are much better known by the hearing officers than could possibly be communicated to a jury.

The medical reports may be from attending physicians, an examining specialist, or a doctor of the medical department of the Industrial Commission who has examined the claimant or the file. There are certain specific provisions of the law which relate to medical proof. When a request is made by the Administrator, board of review or Industrial Commission, a medical advisory board composed of three physicians selected from a special list of registered physicians shall consider the medical questions involved in any claim.[10] Such requests are not frequent. Before compensation may be paid on account of any occupational disease, the existence of which is denied, the claimant must be examined by a medical advisor appointed by the Commission for the purpose of determining the existence of the disease and the approximate time, place and cause of its inception.[11] Before awarding compensation for disability or death due to silicosis, the Commission is required to refer the claim to the "silicosis referees" (three doctors with special knowledge of pulmonary diseases) for examination and recommendation with regard to the diagnosis, the extent of disability, and other medical questions connected with the claim.[12] A medical advisory board may be used in respect to the determination of permanent partial disability under circumstances where their determination becomes binding upon the Commission. This provision is rarely invoked. The very first sentence of familiar Revised Code section 4123.57(B) provides:

> The determination of the employee's permanent physical disability shall be based upon that pathological condition of the employee resulting from the injury and causing permanent physical impairment evidenced by medical or clinical findings reasonably demonstrable but if such findings are based solely upon the testimony of the claimant without corroboration by objective medical findings the commission shall cause a medical

[10] OHIO REV. CODE § 4123.151 (Baldwin 1958).
[11] OHIO REV. CODE § 4123.10 (Baldwin 1958).
[12] OHIO REV. CODE § 4123.68 (Baldwin 1958).

> advisory board to determine whether the employee is physically disabled and the determination of the medical advisory board including its determination if any of the percentage of permanent physical disability of the employee shall be binding upon the commission.

Further, each employee claiming the right to receive compensation must submit to such medical examinations as are required by the Industrial Commission and his refusal to do so will result in the suspension of payments due him or of any proceedings pending in connection with his claim. Revised Code section 4123.53 provides in part:

> Any employee claiming the right to receive compensation may be required by the industrial commission to submit himself for medical examination at any time, and from time to time, at a place reasonably convenient for such employee, and as may be provided by the rules of the commission. . . . If such employee refuses to submit to any such examination or obstructs the same, his right to have his claim for compensation considered, if his claim is pending before the commission, or to receive any payment for compensation theretofore granted, shall be suspended during the period of such refusal or obstruction.

Depositions may be taken at the instance of the Industrial Commission "in the manner prescribed by law for the taking of depositions in civil actions in the court of common pleas."[13] The statute does not seem to give the right to the employer or the claimant to proceed, without the approval and authority of the Industrial Commission, to take a deposition. The statute which controls the right here says that "*the commission* may cause depositions of witnesses" to be taken.[14] Revised Code section 4123.13 makes reference to a "witness subpoenaed at the instance of a party other than the commission. . . ." There has been no reported judicial construction of these statutes and little, if any, practical construction. The general statutory provisions relating to depositions do not apply to proceedings before the Industrial Commission. Revised Code section 2319.06 provides that depositions may be taken "at any time after service upon the defendant."

The proposed new administrative rules provide that depositions of witnesses may be taken and filed by a claimant or employer in accordance with Revised Code section 4123.09, but notice of the time and place of taking the same must be given the opposite party a reasonable time prior to their taking.

Where depositions are taken they are usually arranged by the mutual agreement of the claimant and employer. Where the witness

[13] OHIO REV. CODE § 4123.09 (Baldwin 1958).

[14] *Ibid.*

must be subpoenaed, however, a different situation prevails. While the Commission, as noted, is given the power to issue subpoenas to witnesses for the taking of their depositions, such power is in fact not exercised. If a request is made for the issuance of a subpoena to compel the attendance of a witness for the taking of his deposition it is probable that such request will be refused. The statutory provisions in the Workmen's Compensation Act respecting the taking of depositions are purely discretionary. The Industrial Commission is not required to issue subpoenas for witnesses and compel their attendance. It is suggested that in the event it is desired to secure the testimony of a witness, who refuses to appear at the hearing or to give a statement, the Administrator should be contacted and advised of the nature of the testimony that is sought to be presented through the witness. If the Administrator is satisfied that the testimony will be material to the issues involved in the claim he may send out a field investigator in an effort to obtain a statement from the witness. If this is unsuccessful, it is doubtful that the Administrator will issue a subpoena. He will, however, make a reasonable effort to acquire the testimony of the witness in some other way. Of course, there are many questions that could arise in connection with the exercise of this power such as the range of effective service of a subpoena, and the manner of payment of fees. However, at present these are all academic questions since the Industrial Commission does not exercise the power.

In the case where the witness simply refuses to appear or give a statement and the Industrial Commission will not issue a subpoena is there any way in which his testimony may be obtained prior to the time the case may go to the common pleas court? There is one procedure which is available and is occasionally used by some attorneys. It is the procedure for the perpetuation of testimony provided in Revised Code sections 2319.32-.38. This is a somewhat cumbersome procedure and is rarely used.[15] It is questionable whether the testimony of a witness may properly be taken under the general statutory deposition provisions[16] by having a notary public issue a subpoena to be served by the sheriff upon the witness and the giving of the notice required by law and qualify as a true "deposition."

A further type of evidence which is little used is that authorized by Revised Code section 4123.11, as follows:

> a transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the industrial commission, being certified by such stenographer to be a true and correct transcript of the testimony on the investigation or of a particular witness, or of a

[15] See Industrial Comm'n v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934).
[16] OHIO REV. CODE § 2319.05 *et seq.* (Baldwin 1958).

> specific part of such testimony . . . may be received in evidence by the commission with the same effect as if such stenographer were present and testified to the facts so certified.

This provision has been in the law since 1911 and was not adopted with reference to the type of administrative procedure which is now in effect. Hardly, if ever, does the Commission appoint a stenographer to take a record of the proceedings under the present law.

Occasionally the Administrator, in the course of his investigation of a claim, may obtain a stenographic statement from one or more of the witnesses. Also, court reporters or stenographers are sometimes employed by the employer or the claimant to appear at a hearing and transcribe the proceedings. This is in effect the "stenographic statement" which is sometimes used in the preparation and investigation of accident cases. This is simply an unsworn statement of a person which has been recorded and transcribed. There is no apparent reason why anyone should object to having a record made of a hearing, particularly where it involves the presentation of testimony of material witnesses. The transcript of the record may be presented at later stages in the administrative proceedings for all relevant purposes. In a de novo proceeding in the common pleas court the transcript could not be used as evidence without the qualifying testimony of the reporter. Such use would probably be confined to impeachment of the witness.

Also, exhibits of all types may be presented at the administrative level. Photographs are the most commonly used. Physical evidence is sometimes quite helpful. X-ray films, of course, are used extensively. However, the use of demonstrative type evidence is not approached here with the same enthusiasm as in personal injury litigation.

Influencing the application of the above rules and procedures is the factor stated by the Ohio Supreme Court in *Industrial Comm'n v. Weigandt*:[17]

> The statute was intended to provide a speedy and inexpensive remedy as a substitute for previous unsatisfactory methods, and should be liberally construed in favor of employes.

Particular Problems of Medical Proof

Almost every workmen's compensation claim turns on problems of medical proof. As a result the doctor becomes the key figure in resolving these problems, and the attorney needs some familiarity with them. The significance of the doctor's role becomes clear when it is realized that he often has not only the responsibility for the treatment of the claimant and discovering the nature of his condition, but also must make an evaluation of his temporary and permanent disability and

[17] 102 Ohio St. 1, 130 N.E. 38 (1921).

a determination of the relationship of given conditions to an injury.

The medical problems usually develop in a claim prior to the time that an attorney is employed either by the claimant or the employer. In other words, the claimant will have seen a doctor and secured some medical treatment, and in the case of an employer, an examination may have been conducted by the company physician. On the claimant's side of the case it is not unusual that the attending physician will be unfamiliar with the particular problems presented by a workmen's compensation claim. In that situation the doctor, when asked to report either to the Administrator or to counsel, will in many instances not accurately state the factual situation nor prepare a report satisfying the requirements presented by the claim. Surprisingly, many companies who have regular doctors specializing in industrial medicine on their payroll are also confronted with the same problem. Doctors generally are not enthusiastic about the preparation of detailed medical reports.

How then should the lawyer proceed to prepare and use his medical proof? Considering first the use of the medical report itself, it is necessary to have the doctor furnish as complete a history as possible in his report. The history has significance in several respects, not all of which are directly related to the physical condition of the claimant. It is peculiarly important for the employer's counsel to obtain a detailed history from the doctor, since the history obtained is often significant in determining whether the claimant sustained a compensable injury. The attending physician is in an excellent position to determine the facts giving rise to the injury. When a claimant sees the attending physician for the first time, he is undoubtedly primarily interested in treatment. If the doctor obtains a careful history, it will be very difficult for a claimant to later change his story of how the accident occurred. In other words, did the claimant slip or fall at his work or did his back condition start several nights prior to seeing the doctor as the result of sleeping next to the air conditioner? In many claims the attending physician either fails to record the detailed history or does not interrogate the claimant in any detail since the doctor is primarily interested in the treatment of the condition. Ideally, the industrial physician should find out and record in the history where the claimant was working, what he was doing, the force that was involved in the incident giving rise to the injury and, of course, the immediate effects which followed. A wealth of information can also be obtained from the attending physician if he pursues in the history the background of the claimant's medical condition, *i.e.*, did he have any pre-existing back or other related disability? Did he have any previous injuries to other parts of his body? Has he ever been hospitalized or treated by another physician? Have X-rays been taken? This type of inquiry is particularly helpful to the employer's counsel in determining what avenues his investigation should follow. On the other hand, claimant's counsel

may also be helped by showing through a careful history that the given condition is clearly related to the injury.

There are other medical records which have great value in resolving these problems. Immediately following an accident in a plant there are certain records which are usually prepared. If a man goes to a dispensary, they have a written record of his injury and his complaints. Again, a history is important. Where there is no dispensary, there are often first aid records. In many situations the claimant's immediate supervisor is required to prepare a report as to why the claimant is taking time off from work. This tends to confirm or deny the occurrence of an injury in the plant.

In any case involving hospitalization the hospital records should be carefully examined. They are often decisive in suggesting the real cause of the claimant's disability. Every hospital is required to keep detailed records and as a part of such records a history is usually obtained. Doctors' opinions are normally made a part of the records and they will often again confirm or deny the relationship of a specific disability to the injury.

Most employers now have some form of insurance plan for sickness, accident or disability arising outside the scope of the employee's employment. It is sometimes found upon investigation that a claimant has a claim for sickness benefits covering the same period during which he later claims to have been disabled from an industrial injury. Generally, the insurance benefits are paid upon reports of attending physicians and this type of medical proof is helpful in showing a conflicting opinion as to the cause or existence of a given disability.[18]

All of these records are normally submitted and placed in the claimant's file before it is referred to the medical section. The medical section, with its main office in Columbus and branch offices in various parts of the state, is headed by Dr. Addison L. Kefauver, Chief Deputy Medical Administrator. Working under the medical director are twenty-one doctors. There are twelve full-time doctors and two part-time doctors working in the Columbus office. These doctors are general practitioners and they are broken down into two groups. Seven of them make physical examinations and prepare written reports. The other five doctors do not conduct examinations, but rather devote themselves to detailed analysis of all the proof in a file and then prepare a report reviewing the medical aspects. The significance of their role with respect to medical proof will be discussed in more detail later in this article. The examining doctors see an average of sixteen to eighteen cases a day.

In Dr. Kefauver's opinion, one of the most difficult problems of medical proof confronting the general medical profession is the proper evaluation or rating of disability. This subject is not covered

[18] State *ex rel.* Shelley v. Industrial Comm'n, 133 Ohio St. 438, 14 N.E.2d 412 (1938).

in the doctor's medical school training and most doctors, whether in general practice or specializing, have no background of experience for the purpose of intelligently rating disabilities. The American Medical Association has prepared a guide to the evaluation of permanent impairment of the extremities and the back. It formed a Committee on Medical Rating of Physical Impairment and in a special edition of the AMA Journal, February 15, 1958, presented a detailed study of disability ratings. The American Medical Association recognizes the evaluation or rating of permanent disability as an important and complex subject and suggests that much confusion has resulted from lack of understanding by physicians and others as to the scope of medical responsibility in this field.

The medical section doctor has one great advantage in that he is seeing approximately seventeen claimants a day. Over a period of time this doctor will have the advantage of comparison of one claimant with another and the tremendous backlog of cases built up by reason of his day to day rating of disabilities. Certainly the Industrial Commission supports the conclusion that the medical section is in a better position to evaluate disabilities since it usually follows and adopts the recommendation of its own medical examiner even where there is a considerable conflict of opinion as to the rating of the disability by other medical specialists. Of course, it should be remembered that the doctor of the medical section is employed for the purpose of giving an independent evaluation.

Although another article deals with the judicial review of claims, it should be pointed out that in the event of litigation there are many further problems of medical proof. For example, expert medical testimony is ordinarily required to establish the causal relationship between an injury and the specific condition of ill being. If in the court's opinion the medical issue presented is in a field of scientific inquiry where expert medical testimony is required to furnish the answer, then such medical testimony is necessary to establish the case.[19] The expert medical testimony must also establish that the condition was *probably* caused by the injury and not that such was merely a possibility. Of course, in a case where it is obvious that the condition was due to the injury such medical testimony is not necessary, *i.e.*, amputation of fingers, splashing of acid directly in the eyes. A determination of this question can become a very close one and a careful lawyer will in all cases present medical testimony showing a direct causal relationship between the stated disability and the injury.

Within ten years from the date of the injury or from the date of the last payment of compensation the claimant may claim a new disability due to the original injury.[20] In this situation peculiar problems

[19] Drakulich v. Industrial Comm'n, 137 Ohio St. 82, 27 N.E.2d 932 (1940).
[20] OHIO REV. CODE § 4123.52 (Baldwin 1958).

are presented which require expert medical proof. As a rule, the claimant will file the report of an expert in the field of the claimed disability relating that disability to the original injury. It is extremely important to secure the best possible medical opinion regarding the reasons for the relationship or lack of relationship of a disability to a recognized injury. It has been suggested that the medical section gives more careful scrutiny to the medical proof on file where the particular disability may involve a narrow range within a specialized branch of medicine. This may also involve the use of specialized equipment not available to the members of the medical section.

A problem may also arise as to the proper specialist to make the evaluation. If the claimant alleges that he has an anxiety state, it is clear that a psychiatrist should make the evaluation, but if he is not only alleging an anxiety state but also a bursitis, shortness of breath, a heart condition, etc., it is difficult to determine the proper selection of a specialist. If a specialist is employed who is not qualified by reason of his training or experience, it is safe to assume that his report will be ignored. In this situation it is often helpful to secure the advice of a competent doctor as to the proper selection. Finally, it is sometimes necessary to refer a claimant for evaluation to more than one specialist where the disabilities are in different fields of medicine. The matters to be considered by the specialist and the preparation of his report are discussed elsewhere in this article.

Types of Disability Benefits

Medical proof must also be considered in the context of the particular disability benefit involved or the particular question presented at the time such medical proof is being secured. The areas of disability benefits can be roughly divided into four categories: temporary total;[21] temporary partial;[22] permanent partial; [23] and permanent total.[24]

Temporary total compensation, as the name implies, is paid following an injury for the time when the claimant is off work. The attending physician prepares and completes a form C-1a. As soon as the doctor submits the completed form to the Administrator, compensation is then started, provided the employer has certified that the claimant received an injury. The temporary total compensation continues to be paid on the basis of the attending physician's reports that the man is still totally disabled. If the employer's counsel is going to challenge the legality of continuing payments, it is necessary for a request to be made for a ruling on that point, and suggesting the reasons why temporary total compensation should not be continued. If for any

[21] Ohio Rev. Code § 4123.56 (Baldwin 1958).
[22] Ohio Rev. Code § 4123.57 (Baldwin 1958).
[23] *Ibid.*
[24] Ohio Rev. Code § 4123.58 (Baldwin 1958).

reason the continuing payments are challenged, the medical section follows a procedure of calling the claimant in for an examination and the matter is then determined on the basis of their findings respecting the continuing total disability. Therefore, the only problem of medical proof in this situation ordinarily is obtaining the necessary reports from the attending physician. The dispute arises if the attending physician says the man is still totally disabled but the employer furnishes proof that he is working or not totally disabled. The medical section resolves this question based upon their evaluation of the individual together with the other proof in the file.

The second category of disability is temporary partial disability. There is no real problem presented in this area and the reason is a practical one. It ordinarily arises where the attending physician or the medical section has concluded that the claimant is able to do light work but he does not return to work since none is available and it is expected that there will be some permanent disability. Since temporary partial compensation is deducted from any award for permanent partial compensation, the employer usually does not raise any serious objections to the award.

The type of disability benefit which presents the greatest problem in medical evidence and proof is the determination of a permanent partial disability. Following the payment of temporary total, or in the absence of the payment of any temporary total compensation, there is a forty week waiting period before a determination can be made of the permanent partial disability. There are good reasons for this delay and employer's counsel should resist any effort to have a determination made in advance of that period. It is difficult to make an intelligent determination of the permanent disability any sooner, and further, an early determination ordinarily results in a higher degree of disability which may be of a temporary nature.

Awards under the permanent partial disability section have often been criticized, particularly in a situation where the claimant has lost no time as a result of the injury and has continued to work full-time in his regular occupation with no impairment in his earning capacity and no apparent evidence of any inability to do the type of work which he had been doing prior to the injury. In this situation it is argued that the claimant could not have any permanent partial disability and there is concern when an award is made based upon a significant degree of permanent partial disability.

On the other hand, it would be maintained that the evaluation of permanent partial disability is based upon the proof in the file and the evaluation of the disability by a medical examiner. Normally, when an application is filed asking to have the permanent partial disability determined, the medical report of a specialist will accompany the application. There are certain requirements suggested for that written report. As previously pointed out in this discussion, the medical section and the

Industrial Commission usually have some knowledge of the background and qualifications of the medical experts. Only the Industrial Commission is vested with the jurisdiction to hear and determine an application for percentage of permanent partial disability under Revised Code section 4123.57.[25] When the Industrial Commission or the medical section sees a doctor constantly exaggerating disabilities on the one hand, or on the other, almost never finding any disability, their reaction is fairly clear. The report from that type of doctor is for all practical purposes almost worthless. The selection of a competent specialist is the first step toward having an honest and adequate determination made regarding the claimant's permanent partial disability. By the same token, a doctor who specializes in industrial medicine and who happens to be employed frequently by claimants or employers should be given full consideration if his evaluations are based upon sound medical principles. The mere fact that he is designated as a "company doctor" or "claimant's doctor" by reason of his practice should not in and of itself disqualify him. It is suspected that in some situations this label has that effect even though the doctor is completely competent and thorough in his evaluation and determination of particular disabilities.

It has been suggested, however, that the medical section for the most part makes its own determination of the evaluation of disability based upon the examination by a member of the medical section without reference to the other reports in the file. The medical examiner who examines approximately eighty claimants a week is apt to rely upon his own experience in rating the disabilities rather than the opinion of medical experts employed either by the claimant or the employer. Nevertheless, it is still felt important to secure an examination and evaluation of the claimant by a specialist who is qualified. It is often impossible to distinguish between an evaluation of the disability and a determination as to whether it is related to the injury. In all of these situations it is advisable that the doctor be fully informed prior to his examination so that he will know the background of the claim and will also understand the problem which he is to consider in his examination.

By the same token, in order to have an intelligent medical evaluation by the medical section, proof should be submitted in advance of their examination as to whether or not the claimant is working and, if so, the type of work which he is performing together with detailed wage statements. In many cases the doctor in the medical section is forced to rely solely upon the statements of the claimant. It frequently occurs that the claimant contends he is unable to do any type of work, is unable to do any bending, lifting, stooping or any other activity. If there has been proof submitted in the file showing that the contrary is

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[25] State *ex rel.* Hess v. Industrial Comm'n, 133 Ohio St. 599, 15 N.E.2d 528 (1938); 1955 Ops. Atty. Gen. Ohio No. 6120.

true, it will be a factor to be considered by the medical examiner.

The Industrial Commission ordinarily adopts the recommendation of the medical section. If, however, there is a substantial dispute as to the evaluation which has been made by a member of the medical section, two policies are then sometimes followed. On the one hand, the claim is often referred to Dr. Hudson, a senior member of the medical staff, for his personal review and evaluation of the disability, and in other cases the Commission refers the claim to an outside specialist for an independent evaluation.

There is no set procedure regarding this independent evaluation. In many cases the specialist is merely sent a form asking him to evaluate the man's physical disability. If this procedure is followed, the specialist is making his examination in a vacuum since he has been given no information regarding the background of the claim, the other medical proof on file, or other relevant items of evidence which may have been submitted. It has been the writers' practice to insist in such cases that the entire file be referred to the specialist so that he will not be looking at the case solely on the basis of the complaints as given by the claimant and without the other background in the claim. On other occasions the Industrial Commission or the medical section deems it proper on its own action to send the file to the specialist in connection with his examination. As an example, in every case where a psychiatrist is asked to make an evaluation, he insists that the entire file be forwarded so that he will have the total picture. Doesn't it also follow that the same procedure would be applicable in a disputed heart case or a questioned back disability?

In the last analysis, medical proof is often the crucial factor in the allowance or rejection of a given claim and usually determines the evaluation of a particular type of disability. It well behooves the lawyer practicing in this field to carefully prepare the medical proof whether representing the claimant or the employer.